FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955.

No. 1001136

ARTHUR MUNGIOLE,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Philadelphia 7, Pa.,
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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1955.

No.

ARTHUR MUNGIOLE,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ARTHUR MUNGIOLE, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 10, 1956.

OPINIONS BELOW.

The opinion of the court below (*infra*, Appendix A, pp. 13-15) has not yet been reported. The opinion of the district court overruling petitioner's motion to dismiss is reported at 125 F. Supp. 32. The opinion of the district court denying petitioner's motion for a judgment of acquittal (R. 9a-15a) is reported at 131 F. Supp. 150.

JURISDICTION.

The judgment of the court below (*infra*, Appendix B, p. 16) was entered on May 10, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTIONS PRESENTED.

1. Whether a person can be convicted under §3294(a) of the Internal Revenue Code of 1939 for wagering without paying the wagering tax, where it is shown that the Collector refused payment of the tax unless there was also furnished the information called for on Form 11-C.

2. Whether, under a regulation permitting a person to receive wagers so long as the tax thereon is paid by the end of the month in which the wagering begins, a requirement that the person furnish the information called for on Form 11-C at the time the tax is paid, subsequent to the wagering, improperly violates his privilege against self-incrimination.

3. Whether the doctrine of *United States v. Kahriger*, 345 U. S. 32, should be reexamined in the light of the circumstances in which the wagering tax is now actually enforced.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED.

1. The Fifth Amendment provides, *inter alia*, that ——

> "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; * * *."

2. Section 3285 of the Internal Revenue Code of 1939 provides in pertinent part as follows:

> **"§3285. Tax.**
>
> **"(a) Wagers.** There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.
>
> * * * * * * * *
>
> **"(d) Persons liable for tax.** Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

3. Section 3290 of the Internal Revenue Code of 1939 provides as follows:

> **"§3290. Tax.**
>
> "A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A

[§§3285-3287] or who is engaged in receiving wagers for or on behalf of any person so liable."

4. Section 3294(a) of the Internal Revenue Code of 1939 provides as follows:

> **"§3294. Penalties.**
>
> **"(a) Failure to pay tax.** Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000."

5. 26 CFR §325.50, 16 Fed. Reg. 11218, in effect until September 1, 1952, provided in pertinent part as follows:

> "§325.50 *Registry, return, and payment of tax.* (a) Every person engaging in the business of accepting wagers and liable to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code * * * and every person engaged in receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11-C. * * * The collector, upon request, will furnish to the taxpayer the proper forms which shall be filled out and signed as indicated therein."

STATEMENT.

An information was filed against petitioner for violation of §3294(a) of the Internal Revenue Code of 1939 as amended,[1] in that, on or about April 1, 1952, being a

[1] Throughout this petition, all references are to the Internal Revenue Code of 1939, as amended, 26 U. S. C. (1952 ed.), which was in force at all times here pertinent.

person liable for the payment of the wagering tax imposed by §3290, did accept wagers as defined in §3285, "without having paid the Special Occupational Tax"—i. e., the wagering tax—"imposed by Section 3290 due and owing to the United States on or before 30th day of April, 1952."

After a motion to dismiss the information had been denied (125 F. Supp. 32), petitioner and defendant stipulated the following facts (R. 3a-4a):

> "That the defendant on or about April 1, 1952, at Philadelphia, in the Eastern District of Pennsylvania, within the jurisdiction of this Court, did accept wagers as defined in Title 26 USC Section 3285, and that he did not pay the special occupational tax imposed by Section 3290 that was due to the United States of America on or before the 30th day of April, 1952;
>
> "That the sections contained in Paragraph 4 of Form 11-C then in effect state as follows:
>
> " 'The information called for on the return must be completely furnished. If not so furnished the special tax stamp will not be issued.'
>
> "That in March of 1953 said form was amended, whereby the requirements quoted were eliminated;
>
> "That the reason the defendant did not pay the tax was because the then Collector of Internal Revenue would not accept payment for this tax unless the defendant furnished completely the information as required, which defendant refused to do on the ground it would tend to incriminate him in a federal offense;
>
> "That the defendant had been convicted of state gambling offenses prior to April 1, 1952; to wit, on March 7, 1937; September 22, 1937; and November 15, 1945."

The only other evidence introduced was the form referred to in the stipulation, Form 11-C (R. 7a-8a), which stated at the foot of the face thereof (R. 7a),

> "This return must be filed with the Collector of Internal Revenue for your district * * *, accompanied by remittance, on or before the last day of the month in which liability is incurred in order to avoid penalties."

Par. 3 of the instructions on the reverse of Form 11-C (R. 8a) provided in part,

> "If the return is not filed with the collector during the month in which liability began, the penalty prescribed by section 3612(d) of the Internal Revenue Code, may be incurred."

At the time of the offense alleged, and until September 1, 1952, 26 CFR §325.50(a), 16 Fed. Reg. 11218, provided in pertinent part:

> "§325.50. *Registry, return, and payment of tax.* (a) Every person engaging in the business of accepting wagers and liable to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code * * * and every person engaged in receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11-C. * * * The collector, upon request, will furnish to the taxpayer the proper forms which shall be filled out and signed as indicated therein."[2]

The district court denied the petitioner's motion for a judgment of acquittal (R. 9a-15a; 131 F. Supp. 150), and sentenced him to pay a fine of $1000 (R. 15a), allowing bail pending appeal (R. 16a).

On appeal, the court below affirmed (Appendix A, *infra*, pp. 13-15). It held that "There is not an iota of evidence

---

[2] Thereafter, effective September 1, 1952, this regulation was amended so as to require the filing of the return and the payment of the special tax prior to engaging in the business of accepting wagers. See 17 Fed. Reg. 6732, and pp. 7, 8, **infra.**

in the record as to when Mungiole attempted to pay the tax, or as to the amount of money, if any, he tendered to the Collector for the payment of the tax." The court rejected petitioner's defense that the furnishing of the information required by Form 11-C would tend to incriminate him, saying,

> "In the instant case Mungiole may have tendered payment of the tax before accepting wagers, in which event his claim of the privilege against self-incrimination would be totally lacking in substance. We cannot assume in the absence of any evidence that Mungiole followed a contrary course of action. He has not brought forward facts by which his claim of self-incrimination can be supported."

REASONS FOR GRANTING THE WRIT.

By ignoring a controlling regulation that completely transforms the nature of the offense of which petitioner was convicted, the court below has raised, within the compass of the present narrow record, grave questions of constitutional law that call for review here.

First. Contrary to the assumptions made below, §3290 (*supra*, p. 3), which required payment of the wagering tax, was not prospective in operation at the time petitioner was charged with its violation. At all times here material, Regulations 132, Miscellaneous Excise Taxes, provided in 26 CFR §325.50(a) that "Every person engaging in the business of accepting wagers * * * shall on or before the last day of the month in which business is commenced file a return on Form 11-C" (16 Fed. Reg. 11218). Not until September 1, 1952, did this regulation require the payment of the wagering tax prior to engaging in the business of accepting wagers. See 26 CFR §325.50(a), as amended July 23, 1952

(17 Fed. Reg. 6732; see p. 6733 for the effective date). The statement in *Lewis v. United States*, 348 U. S. 418, 422, that "The Act is wholly prospective", and the similar statement in *United States v. Kahriger*, 345 U. S. 32-33, while correct at the time those opinions were written, is plainly not applicable in this case, where the offense was alleged to have taken place prior to September 1, 1952.

Here petitioner was accused (R. 2a) of accepting wagers on April 1, 1952, without having paid the wagering tax due on or before April 30, 1952. He was not charged with failure to register. But it was stipulated that the only reason he did not pay the tax was because the then Collector would not accept payment unless petitioner furnished the information called for on Form 11-C, which petitioner refused to do because to do so would tend to incriminate him in a federal offense (R. 4a). Thus petitioner was found guilty by the trier of facts (R. 15a), not of gambling without paying the tax, but of gambling without registering, which is a wholly different matter. Thus there was violated "The rule that a man shall not be charged with one crime and convicted of another." *Schooner Hoppet v. United States*, 7 Cranch 389, 394; *Cole v. Arkansas*, 333 U. S. 196.

The court below (Appendix A, *infra*, pp. 13-15) affirmed the conviction on the footing that petitioner did not show when he tendered the tax or how much he offered to pay. This was a point not mentioned by the trier of facts, and was raised only by the appellate court after the case had been under advisement there for seven months.[3] The trial court had said that: "The issue is whether the defendant had a right to refuse to answer the questions set out in the Application for Registry on the ground that such answers might tend to incriminate him of a federal crime" (R. 9a, 10a). Thus the court below has improperly shifted the burden of proof to the defendant in a criminal case. Plainly,

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[3] Argued October 7, 1955, decided May 10, 1956 (Appendix A, **infra**, p. 13).

to the extent that the proof left the matter uncertain, the prosecution has not proved its case against petitioner beyond a reasonable doubt.

Second. Petitioner has been convicted of engaging in wagering without paying the tax but only because he refused to incriminate himself. Thus the case falls squarely within *United States v. Sullivan,* 274 U. S. 259.

There a person who derived the bulk of his income from violations of the National Prohibition Act was convicted of wilfully refusing to file an income tax return. He defended on the ground that the filing of such a return would require him to incriminate himself. This Court, speaking through Mr. Justice Holmes, said (274 U. S. at 263):

> "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all."

Petitioner here did everything that Sullivan was told by this Court to do. But the Collector refused to receive the tax unless petitioner went on to incriminate himself (R. 4a).

Third. Petitioner's fear was not imaginary. See trial court's opinion (R. 10a, 11a). Since 26 CFR §325.50(a) then in force permitted him to accept wagers throughout the month of April 1952 so long as he paid the tax by the last day of the month, full reply to the questions required to have been answered would necessarily have involved incrimination, as it was only stipulated that wagers had been received on or about April 1 (R. 3a). And, to the extent that the requirement was prospective, the furnishing of the information would have supplied leads for prosecution in the future. Cf. *Hoffman v. United States,* 341 U. S. 479, 486, 487; *Emspak v. United States,* 349 U. S. 190, 198-201. And see *United States v. Ginn,* 222 F. 2d 289, 291, where the court

below refused to construe the alien registration provisions so as to expose an alien, upon registration, to prosecution for either past or future offenses.

Fourth. Petitioner's fears, it needs to be emphasized, were very real. He had already been convicted of three state gambling offenses (R. 4a). And under the federal statute, any gambling whatever by one who has not paid the federal tax becomes a federal offense, so that, in fact, violations of state laws against gambling are now prosecuted by the United States Attorney. That statement is not hyperbole; it is fully documented by *Daley v. United States*, 231 F. 2d 123 (C. A. 1), pending on petition for certiorari, No. 876, this Term.

Fifth. The truly disturbing feature of the present case is that it confirms, in a case that went to trial, the fears expressed in *United States v. Kahriger*, 345 U. S. 32: It shows that the Internal Revenue Service, far from keeping the cash and letting the credit go, is interested only in having gamblers incriminate themselves even at the expense of the federal fisc. So far as counsel is aware, this is the first instance an individual has been convicted for not paying a tax where payment was not accepted because he refused as a condition of payment to incriminate himself. Although "there is no constitutional right to gamble" or to sell tobacco or cheese, the Government by regulation could not *here* refuse to accept payment and yet properly *criminally* prosecute for failure to pay the tax. Thus there is presented a case which assuredly warrants review by this Court, and which strongly suggests as well that it may be appropriate to reexamine what was decided, on motion to dismiss, in *United States v. Kahriger*, 345 U. S. 32. Now that the actual operation of the statute there considered *in vacuo* has become apparent, the time seems ripe for an appeal from judgment by speculation to judgment by experience.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

June, 1956.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for the Petitioner.

Appendix

APPENDIX "A".

OPINION BELOW.

UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 11,647.

UNITED STATES OF AMERICA
v.
ARTHUR MUNGIOLE,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued October 7, 1955.

Before: BIGGS, Chief Judge, and MARIS and GOODRICH, Circuit Judges.

OPINION OF THE COURT.

(Filed May 10, 1956.)

By BIGGS, Chief Judge.

The defendant, Mungiole, was charged in an information with violation of Title 26, U. S. C. §3294(a) for having accepted wagers without having paid the special occupational tax imposed on wagering by Title 26, U. S. C. §3290, "due and owing to the United States on or before 30th day of April, 1952."[1]

The case was tried on a stipulation of facts. It was agreed that Mungiole "on or about April 1, 1952 * * * [accepted] wagers as defined in Title 26 U. S. C. Section 3285, and that he did not pay the special occupational tax imposed by Section 3290 that was due to the United States * * * on or before the 30th day of April, 1952." The parties further stipulated that "the reason the defendant did not pay the tax was because the then Collector of Internal Revenue would not accept payment for this tax unless the defendant furnished completely the information as required, which defendant refused to do on the ground it would tend to incriminate him in a federal offense." It will be observed that the stipulation of facts as to Mungiole's gambling activities parallels the statement in the information, each matching the other as to the date on which he first accepted wagers, each employing the phrase, "on or about April 1, 1952, [Mungiole] accepted wagers."

There is not an iota of evidence in the record as to when Mungiole attempted to pay the tax, or as to the amount of

---

[1] The pertinent statutory provisions are Sections 3285(b)(1), 3290, 3291, and 3294(a) of the Internal Revenue Code of 1939, Title 26, U. S. C.

The applicable section of the Treasury Regulations is found at 26 C. F. R. §325.50.

money, if any, he tendered to the Collector for the payment of the tax.

Mungiole was tried to the court, found guilty, and sentenced. See also 131 F. Supp. 150 (1955). He has appealed.

Mungiole asserts as his defense that he could not furnish the information required by Form 11-C without incriminating himself in a federal offense. But the registration requirements of the special occupational tax on wagering are prospective. The statute contemplates the filing of the required information and the payment of the special occupational tax before the gambler commences business. United States v. Kahriger, 345 U. S. 22 (1953). In Kahriger the Supreme Court said: "Nor do we find the registration requirements of the wagering tax offensive. All that is required is the filing of names, addresses, and places of business."[2] *Id.* at p. 31.

In the instant case Mungiole may have tendered payment of the tax before accepting wagers, in which event his claim of the privilege against self-incrimination would be totally lacking in substance. We cannot assume in the absence of any evidence that Mungiole followed a contrary course of action. He has not brought forward facts by which his claim of self-incrimination can be supported.

The judgment of conviction will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

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[2] Form 11-C in the Kahriger case was identical with Form 11-C, as stipulated into the record, in the case at bar. Form 11-C as presently constituted has omitted paragraph 4 of the "Instructions" which provided: "The information called for on the return must be completely furnished. If not so furnished, the special stamp tax will not be issued. • • •"

In view of the decision of the Supreme Court in the Kahriger case, the change seems to have been effected by the Treasury Department as a matter of grace and not **ex necessitate.**

APPENDIX "B".

JUDGMENT BELOW.

UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 11,647.

UNITED STATES OF AMERICA
vs.
ARTHUR MUNGIOLE,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, Chief Judge, and MARIS and GOODRICH, Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

May 10, 1956.

Attest:
IDA O. CRESKOFF,
Clerk.

FILED
JUN 6 1956
HAROLD B. WILLEY, Clerk

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. [redacted]136

UNITED STATES OF AMERICA,

vs.

ARTHUR MUNGIOLE,

Appellant.

APPEAL FROM THE SENTENCE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA (No. 17774).

Appendix for Appellant

JACOB KOSSMAN,
1225 Spruce Street,
Philadelphia 7, Pa.,
Attorney for Appellant.

Martin & Lyle, 1103 Stephen Girard Bldg., Phila. 7, Pa.

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Appendix

RELIVANT DOCKET ENTRIES.

1954
May 24 Information filed.
May 27 Motion to dismiss filed.

* * * * * * * * *

Aug. 11 Plea. Not guilty.

* * * * * * * * *

Oct. 18 Opinion, Grim, J. and order denying motion to dismiss filed.

1955
Mar. 17 Waiver by defendant of trial by jury filed.
Mar. 17 Non-Jury trial. Facts stipulated.

* * * * * * * * *

May 3 Opinion, Lord, J. denying defendant's motion for Judgment of Acquittal filed.
May 11 Verdict. The Court adjudges the defendant "Guilty."
May 11 Sentence Co. No. 1. Fine $1,000.00 * * *
May 11 Defendant's notice of appeal filed.

* * * * * * * * *

May 16 Judgment and Commitment filed.

Information
Testimony

INFORMATION.

THE UNITED STATES ATTORNEY CHARGES:

That on or about the 1st day of April, 1952, at Philadelphia, in the Eastern District of Pennsylvania, within the jurisdiction of this Court, ARTHUR MUNGIOLE, being a person liable for the payment of Special Occupational Tax imposed by Title 26 U. S. C., Section 3290, did accept wagers as defined in Title 26 U. S. C., Section 3285, without having paid the Special Occupational Tax imposed by Section 3290 due and owing to the United States on or before 30th day of April, 1952.

In violation of Title 26 U. S. C., Section 3294(a).

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(2) TESTIMONY.

MR. SPIEGEL: If it please the Court, in the case of United States v. Mungiole, Criminal No. 17774, counsel for the defendant and counsel for the Government have agreed to enter into a stipulation as to the facts involved in the case.

With counsel's permission I would like to read the stipulation into the record. The stipulation, to be technical, is between the defendant and the United States.

THE COURT: Is that correct, Mr. Kossman?

MR. KOSSMAN: That is correct, Your Honor.

* * * * * * * * *

(5) MR. SPIEGEL: I would like to state for the record that the defendant, before Your Honor and witnessed by Mr. Kossman, attorney for the defendant, and myself, has (6) waived a trial by jury.

THE COURT: May I see a copy of the stipulation?

MR. SPIEGEL: I will hand this to Your Honor.

THE COURT: Mr. Kossman, the stipulated facts are agreed to by you, are they?

I see that there is a place for the signature of the defendant and the United States Attorney.

MR. SPIEGEL: We were going to read it into the record, sir, rather than hand it up as a written stipulation.

THE COURT: Very well.

Suppose then the facts be read into the record as a stipulation and agreement between the Government and the defendant and his counsel.

MR. SPIEGEL: May I proceed, Your Honor?

THE COURT: Yes.

MR. SPIEGEL: The stipulation reads as follows:

It is hereby stipulated between the defendant, Arthur Mungiole, and the United States of America that if the agents of the Internal Revenue Service and other persons were to testify from the witness stand they would testify to the following facts:

That the defendant on or about April 1, 1952, (7) at Philadelphia, in the Eastern District of Pennsylvania, within the jurisdiction of this Court, did accept wagers as defined in Title 26 USC Section 3285, and that he did not pay the

special occupational tax imposed by Section 3290 that was due to the United States of America on or before the 30th day of April, 1952;

That the sections contained in Paragraph 4 of Form 11-C then in effect state as follows:

"The information called for on the return must be completely furnished If not so furnished the special tax stamp will not be issued."

That in March of 1953 said form was amended, whereby the requirements quoted were eliminated;

That the reason the defendant did not pay the tax was because the then Collector of Internal Revenue would not accept payment for this tax unless the defendant furnished completely the information as required, which defendant refused to do on the ground it would tend to incriminate him in a federal offense;

That the defendant had been convicted of state gambling offenses prior to April 1, 1952; to wit, on March 7, 1937; September 22, 1937; and November 15, 1945.

(8) That competes the stipulation, if the Court please.

If the Court please, I will substitute a cleaner copy of the form. I would like to introduce into evidence as Government's Exhibit 1 Form 11-C referred to in the stipulation. I so move for the introduction of G-1.

THE COURT: Do you have any objection, Mr. Kossman?

MR. KOSSMAN: No.

(Form 11-C was received in evidence and marked Government's Exhibit 1.)

THE COURT: Mr. Kossman, as I understand it, your client and you both agree to the stipulation of facts as has been read into the record.

MR. KOSSMAN: That is correct, Your Honor.

MR. SPIEGEL: That is the Government's case, Your Honor.

MR. KOSSMAN: The Government rests?

MR. SPIEGEL: Yes.

MR. KOSSMAN: Now, I will formally move for a motion for judgment of acquittal.

THE COURT: I shall reserve decision on that motion.

MR. KOSSMAN: And the defendant rests and I (9) will renew my motion for judgment of acquittal.

THE COURT: I shall reserve decision on that motion.

MR. KOSSMAN: Does the Court care to hear a little argument preliminarily?

THE COURT: Yes.

(Argument off the record.)

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

(See instructions on back)

1. Return for period from ..... (Month) ..... (Year), to June 30, 19.....

2. Full name .....
(Print true name followed by trade name)

3. Address
Business .....
Residence .....

4. Show by X in one of the following squares nature of application:
☐ First application ☐ Renewal ☐ Change of address (Date) .....
☐ Change of ownership (Date) ..... Former owner .....

5. Name of members of firm or partnership, or officers of corporation.

Name	Title	Home address

For Collector's Use Only

(Stamp number) .....

(Date issued) .....

(Registration number) .....

	Dollars	Cents
Tax		
Penalty		
Total		

Make remittance payable to "Collector of Internal Revenue." Payment may be made only by cash, certified check, cashier's check, or money order.

(If more space is required for items 6 (*a*), 6 (*c*), or 7, continue on reverse side or attach additional sheets, identifying each sheet and entry as to item number.)

6. Are you engaged in the business of accepting wagers for your own account? ☐ Yes ☐ No (check one).
If yes, complete (*a*), (*b*), and (*c*) of this item.

(*a*) Name and address where each such business is conducted.

Name of location	Street address	City and State

(*b*) Number of employees or agents engaged in the business of receiving wagers on your behalf .....

(*c*) True name and residence address of each such person.

Name	Street address	City and State

7. Do you receive wagers for or on behalf of some other person or persons? ☐ Yes ☐ No (check one).
If yes, give name and residence address of each such person.

Name	Street address	City and State

I declare under the penalties of perjury that this application (including any accompanying statement or lists) is hereby made pursuant to subchapter B, 27A, Internal Revenue Code, for the period indicated above to cover the wagering business or businesses stated and at the locations specified has been examined by me, and to the best of my knowledge and belief is true and correct.

Dated ..... 19.....

(Signature) .....

(State whether individual owner, member of firm, or if corporation officer, give title) .....

This return must be filed with the Collector of Internal Revenue for your district (see par. 3 of instructions for proper place of filing), accompanied by remittance, on or before the last day of the month in which liability is incurred in order to avoid penalties.

16—65311-1

GOVERNMENT'S EXHIBIT NO.1 (face) (7 a)

INSTRUCTIONS

(For full instructions see Regulations 132)

PARAGRAPH 1 (*a*).—Under the provisions of section 3290 of the Internal Revenue Code every person who is liable for the 10-percent excise tax imposed by section 3285 of the Code, and every person who is engaged in receiving wagers for or on behalf of any person so liable, is subject to a special tax of $50 per year.

(*b*) Section 3285 of the Code defines the term "wager" to mean (1) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (3) any wager placed in a lottery conducted for profit.

The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (1) the wagers are placed, (2) the winners are determined, and (3) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101 of the Code, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

PARAGRAPH 2.—Special tax liability is computed from the first of July of each year, or the first day of the month during which business is commenced, to the thirtieth day of June following. Where business is begun after the month of July, the tax to be remitted is computed by multiplying the monthly rate of $4.16⅔ by the number of months remaining in the fiscal year. If the amount resulting involves a fraction, the full cent must be included. Example: If a person first commences business in November, liability should be computed as follows: $4.16⅔ × 8, the number of months remaining in the fiscal year, equals $33.33⅓, or $33.34, the amount to be remitted.

PARAGRAPH 3.—The return must be filed with the Collector of Internal Revenue for the district in which is located the taxpayer's office or principal place of business (or if he has no office or principal place of business in the United States, with the Collector of Internal Revenue, Baltimore, Maryland). If the return is not filed with the collector during the month in which liability began, the penalty prescribed by section 3612 (d) of the Internal Revenue Code, may be incurred. In addition, under the provisions of section 3294 of the Code any person who does any act which makes him liable for the special tax, without having paid such tax, shall be fined not less than $1,000 and not more than $5,000. For willful failure to file a return or pay the tax, the penalties under section 2707 may be imposed.

PARAGRAPH 4.—The information called for on the return must be completely furnished. If not so furnished, the special tax stamp will not be issued. Where the taxpayer is an individual, his true name must be entered in Item 2, followed by his alias, style, or trade name, if one is used, and both his residence and business addresses in Item 3. The special tax stamp may not be issued in a trade name only.

PARAGRAPH 5.—Change of place of business or residence address must be registered with the Collector of Internal Revenue within 30 days after such change, or liability to additional tax and penalty will be incurred.

PARAGRAPH 6.—Under the general provisions of section 1001 of Title 18 of the United States Code, whoever knowingly makes any false or fictitious statement with respect to the payment of the special tax, such as the giving of a false name or address, may be fined not more than $10,000 or imprisoned not more than 5 years, or both.

Items 6 (*a*), 6 (*c*), or 7 (continued)

Item No.	Name	Street address	City and State
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U. S. GOVERNMENT PRINTING OFFICE 16—65311-1

GOVERNMENT'S EXHIBIT NO.1 (reverse) (8 a)

OPINION.

LORD, J. May 3, 1955

The defendant has moved for judgment of acquittal.

The facts are as follows: An Information was filed in the District Court of the United States for the Eastern District of Pennsylvania charging defendant, Arthur Mungiole, with failure to pay the special occupational tax imposed on wagering by Title 26, U. S. C. A. §3290, a violation of Title 26, U. S. C. A. §3294(a). The defendant entered a plea of not guilty at the time of his arraignment. At the trial, the Government's case consisted of a stipulation of facts wherein the parties agreed that the defendant, on or about April 1, 1952, at Philadelphia, in the Eastern District of Pennsylvania, within the jurisdiction of this Court, did accept wagers as defined in Title 26, U. S. C. A. §3285, and that he did not pay the special occupational tax imposed by §3290 that was due to the United States of America on or before the 30th day of April, 1952; that the instructions contained in paragraph 4 of Form 11-C, issued by the Treasury Department, Internal Revenue Service titled "Special Tax Return and Application for Registry-Wagering" then in effect, state as follows: "The information called for on the return must be completely furnished. If not so furnished, the special tax stamp will not be issued"; that the reason the defendant did not pay the tax was because the then Collector of Internal Revenue would not accept payment for the tax unless the defendant furnished completely the information as required, which defendant refused to do on the grounds it would tend to incriminate him of a federal offense; and that the defendant had been convicted of State gambling offenses prior to April 1, 1952, to wit: on March 7, 1937, September 22, 1937, and November 15, 1945.

The issue is whether the defendant had a right to refuse

to answer the questions set out in the Application for Registry on the ground that such answers might tend to incriminate him of a federal crime.

Defendant previously had filed a motion to dismiss the Information. In support of that motion, an affidavit was filed by the defendant giving all of the facts here advanced by the defendant except that at the previous argument on the motion there were no facts stipulated or proof shown, as here, that on April 1, 1952 he accepted wagers and did not pay the tax due on April 30, 1952 and that he has been convicted of gambling in the State courts on three different occasions, the last conviction occurring on November 15, 1945. The motion to dismiss the Information was denied. *United States v. Mungiole*, 125 F. Supp. 32 (E. D. Pa. 1954). Judge Grim there held that the defendant's affidavit contained no evidence tending to show that he might incriminate himself of past offenses had he filled out the Form, but such evidence could be presented at the trial. Thus, a determination must now be made as to whether the additional facts showing past convictions of gambling and that the defendant was accepting wagers on April 1, 1952 are sufficient to require a different result on the present motion.

If this were a case of first impression, the Court would feel inclined to hold for the defendant.

The reason for this is it would appear to be clear that ordinarily a person would have the right to claim the privilege against self-incrimination and could refuse to answer questions concerning his business, his partners, the location of the business, the number of employees or agents engaged by him in the business, their names and addresses, all as required in the present Application for Registry. This is particularly true in this case where defendant admits he accepted wagers and was thrice convicted for so doing. It would seem that no better direct proof could be offered to show that he was engaged for sometime in gambling and was so engaged on April 1, 1952. Conceivably the answers

would incriminate him as to any number of federal offenses such as failure to pay withholding taxes, social security taxes, et cetera. As was stated in *United States v. Coffey*, 198 F. 2d 438, 440 (3rd Cir. 1952):

> " * * * It is enough (1) that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime against the United States, and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. It is in this latter connection, the credibility of the suggested connecting chain, that the reputation and known history of the witness may be significant."

However, there are certain expressions of the appellate courts which impel this Court to deny the present motion for acquittal. The defendant desires to be licensed to engage in the profession of gambling within the requirements of the law. There is no compulsion for him to continue in this occupation. If he does not want to accept the risk of incriminating himself, he need not apply for registry. In *Lewis v. United States*, 23 U. S. Law Week 4119 (Decided March 14, 1955), the Supreme Court said:

> "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefor, as in this case, he cannot be compelled to testify and may claim his privilege. The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They may have

to give up gambling but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax."

Further, there is no question but that the Act is constitutional and the registration requirements are not a violation of the Fifth Amendment. *United States v. Kahriger*, 345 U. S. 22 (1952), where the Court said (page 31):

> "Nor do we find the registration requirements of the wagering tax offensive. All that is required is the filing of names, addresses, and places of business. This is quite general in tax returns. Such data are directly and intimately related to the collection of the tax and are 'obviously supportable as in aid of a revenue purpose'."

and (page 32):

> "* * * Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions."

The defendant agrees that under the present state of the law, as above set forth, if he desired to accept wagers after September 1, 1952, he would be required to register and would not be able to raise the question of self-incrimination. This is because a revised Form 11-C was issued by the Treasury Department at that time eliminating (1) the requirement that all of the information called for on the return must be completely furnished, otherwise a special tax stamp would not be issued, and (2) the prior privilege under the original form whereby he could apply for the tax stamp on or before the last day of the month in which liability was incurred. The present revised regulations provide that no person shall engage in receiving wagers *until* he has filed

a return and paid the tax. He argues in his case however, under the old regulations, there was no such requirement and that he was entitled to accept wagers as a matter of law on April 1, 1952 and was not required to file until April 30, 1952.

He further reasons that, in view of his admissions on the record, the clear inference is that he was engaged in the gambling business prior to April 1, 1952. Thus if after April 1, 1952 he applied for registry and had to fill out the entire initial form as then required, his answers would tend to incriminate him as to possible additional further offenses. The Court does not believe this is a vital distinction. The Act is wholly prospective. *Lewis v. United States*, supra.

Defendant concedes that if he filed on April 1, 1952 he could not interpose his present defense as he would then be in the same position as if he filed on September 1, 1952. His answer would have been entirely voluntary and if he desired the tax stamp as stated previously, he would have had to assume the risk of self-incrimination. How then can it be said that if he filed April 2, 1952, or thereafter, any day until the last date, viz. April 30, 1952, he is then excused from filing?

In *United States v. Kahriger*, 210 F. 2d 565 (3rd Cir. 1954), the defendant stipulated the identical facts as agreed to here with the exception of the three prior convictions. In that case the defendant admitted that he "* * * on and before November 26, 1951, at Philadelphia, was engaged in the business of accepting wagers, and did accept wagers * * *" The convictions in the present case are merely cumulative as additional proof of such business activity. The court held that the defendant was not guilty of "wilful failure to pay the tax and to register." Specifically it excluded the consideration of whether the defendant there was guilty of a violation of the present section of the Act under consideration (3294a) but said (p. 571):

> "* * * The offense proscribed by Section 3294(a) is in all probability a lesser one than that defined by Sec-

tion 3294(c) which, as has been pointed out, relates to willful violations. We do not have to decide this question and the possible application of Rule 31(c), Fed. Rules Cr. Proc., for the case was tried by the United States on the theory of willful violations and so went to the trier of the facts. The record in the trial court is devoid of any suggestion that a penalty should have been imposed for a non-willful failure to pay the tax under Section 3294(a). The issue of possible application of Rule 31(c) was not raised by the parties in this court. We have adverted to it *sua sponte* to the end that possible future confusion may be avoided. We think it is clear that on the record Kahriger's motions for judgment of acquittal should have been granted. We are also of the opinion that the case is not one in which we should exercise our power, if we possess such, *to remand the case so that a sentence under Section 3294(a) might be imposed on him.*" (Emphasis supplied.)

It might reasonably be inferred that the court had a case in mind, such as the present one, when writing its concluding sentence.

Furthermore, the Circuit Court in footnote number 1 said (p. 567):

"1. In oral argument Kahriger distinguished the circumstances of the prior appeal from those of the case at bar, pointing out that the original appeal was based on a denial of a motion to dismiss on the pleading, no evidence having been received, while the appeal at bar is based on a denial of motions for judgment of acquittal, a stipulation and evidence having been received. He asserts that there is now evidence which indicates that the questions required by the statute and Form 11-C required him to incriminate himself. Kahriger contends that the Supreme Court interpreted the statute

without the benefit of having in the record circumstances which showed Kahriger's status as a professional gambler. This is true but the difficulty in supporting his contention is that no facts are to be found in the stipulation and evidence that show that he would have incriminated himself had he filled out the form. He might, perhaps, have made such proof but he did not do so. His contention therefore cannot be sustained."

Since this Court believes that the prior convictions of Mungiole were merely cumulative of what Kahriger admitted, it would seem that the present defendant's contention cannot be sustained as was indicated in the *Kahriger* case.

For the above reasons, the defendant's motion for judgment of acquittal is DENIED.

JOHN W. LORD, JR.,
J.

SENTENCE.

BEFORE THE HONORABLE JOHN W. LORD, JR.
MAY 11, 1955.

(2) THE COURT: In the Mongiole case, since I have filed an opinion and overruled your motion of acquittal, I find the defendant guilty.

The sentence of the Court on Count No. 1 of the indictment is the minimum fine of $1,000, to be paid within thirty days, and if not paid within thirty days, the defendant to stand committed until the fine is paid.

MR. KOSSMAN: Well, if the Court pleases, I wish to take an appeal and would the Court fix bail pending appeal

and also stay the payment of the fine pending disposition of the case by the appellate courts.

THE COURT: What is your thought on that, Mr. Spiegel?

MR. SPIEGEL: Mr. White is here, I do not know his opinion, I have not had an opportunity to discuss it with him.

MR. WHITE: May I suggest to Your Honor, in a matter where a fine has been imposed, on appeal, that it be a condition of bail that the bail provide for payment of the fine should the appeal be unavailing.

THE COURT: I think that is a very proper request. What should the bail be?

MR. WHITE: $1,000.

(3) THE COURT: The bail is fixed at $1,000 and the condition of the bail would be the payment of the fine in the event that the appellate court affirms my decision in the case.

MR. KOSSMAN: And the payment of that is suspended until the actual decision of the appellate courts?

THE COURT: That is right.

* * * * * * * * * *

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390269—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 136

ARTHUR MUNGIOLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 13–15) has not yet been reported. The opinion of the District Court overruling petitioner's motion to dismiss is reported at 125 F. Supp. 32. The opinion of the District Court denying petitioner's motion for a judgment of acquittal (R. 9a–15a) is reported at 131 F. Supp. 150.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1956 (Pet. 16–17). The petition for a writ of

certiorari was filed on June 6, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the fact that petitioner might have accepted wagers prior to paying the special occupational tax required by 26 U. S. C. 3290 (1952 ed.)[1] makes the requirement of registration in connection with this tax unconstitutional as compelling him to incriminate himself in violation of the Fifth Amendment.

STATUTES AND REGULATION INVOLVED

26 U. S. C. 3290 (Chapter 27A, Subchapter B) provided:

> **Tax**
>
> A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U. S. C. 3285 (a) (subchapter A referred to in Section 3290 above) provided:

> **Wagers**
>
> There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

26 U. S. C. 3271 (made applicable to the special tax under Subchapter B by Section 3292) provided in relevant part:

[1] References throughout this brief to Title 26 are to the United States Code, 1952 edition, containing the Internal Revenue Code of 1939, as amended.

Payment of tax—(a) Condition precedent to doing business

No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor in the manner provided in this chapter.

26 U. S. C. 3294 (a) provided:

Failure to pay tax

Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

Section 325.50 of Treasury Regulations 132 (16 F. R. 11211, 11218–19) provided in relevant part prior to September 1, 1952 (see 17 F. R. 6732–6733):

Registry, return, and payment of tax. (a) Every person engaging in the business of accepting wagers and liable to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code * * * and every person engaged in receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11–C. * * *

(b) Every person engaged on November 1, 1951, in any business which makes him subject to the special tax, or first engaging in such business during the month of November 1951, shall register and file a return on Form 11–C and pay the tax on or before November 30, 1951. Thereafter, such person shall register, file a

return, and pay the tax on or before the last day of July of each year.

STATEMENT

Petitioner was charged in an information with violation of 26 U. S. C. 3294 (a) (*supra*, p. 3) for having accepted wagers (as defined in 26 U. S. C. 3285) without having paid the special occupational tax imposed on wagering by 26 U. S. C. 3290, "due and owing to the United States on or before the 30th day of April, 1952" (R. 2a).

Petitioner filed a motion to dismiss the information on the ground that compliance with the statute would compel self-incrimination. The court denied the motion, holding that there was not before it evidence to sustain the allegation (125 F. Supp. 32). The case then went to trial on the following stipulation of facts (R. 3a–4a):

> That the defendant on or about April 1, 1952, at Philadelphia, in the Eastern District of Pennsylvania, within the jurisdiction of this Court, did accept wagers as defined in Title 26 USC Section 3285, and that he did not pay the special occupational tax imposed by Section 3290 that was due to the United States of America on or before the 30th day of April, 1952;
>
> That the sections contained in Paragraph 4 of Form 11–C[2] then in effect state as follows:
>
> "The information called for on the return must be completely furnished. If not so furnished the special tax stamp will not be issued."

[2] Form 11–C was introduced into evidence as Government's Exhibit 1 (R. 4a, 7a–8a).

That in March of 1953 said form was amended whereby the requirements quoted were eliminated;

That the reason the defendant did not pay the tax was because the then Collector of Internal Revenue would not accept payment for this tax unless the defendant furnished completely the information as required, which defendant refused to do on the ground it would tend to incriminate him in a federal offense;

That the defendant had been convicted of state gambling offenses prior to April 1, 1952; to wit, on March 7, 1937; September 22, 1937; and November 15, 1945.

After the entry of the stipulation, petitioner moved for a judgment of acquittal (R. 5a). The court denied the motion (R. 9a–15a, 131 F. Supp. 150), found petitioner guilty, and sentenced him to pay a fine of $1,000 (R. 15a).

On appeal, the conviction was affirmed, the Court of Appeals holding that petitioner's claim of self-incrimination was not supported by the facts (Pet. 15).

ARGUMENT

At the time of the offense charged, Section 325.50 of Treasury Regulations 132 provided for the payment of the special occupational tax on or before the last day of the month in which business was commenced.[3] Petitioner argues that, for this reason, the Wagering Tax Act was unconstitutional as applied to his case in that compliance with the registration re-

[3] The regulation was amended effective September 1, 1952, to make it clear that the $50 tax must be paid before engaging in the business of taking wagers. See 17 F. R. 6732–6733.

quirements would compel reporting of past crimes in contravention of the Fifth Amendment. His contention is refuted by the recent decisions in *Lewis* v. *United States*, 348 U. S. 419, and *United States* v. *Kahriger*, 345 U. S. 22.

In the *Lewis* case, which arose in the District of Columbia where acceptance of wagers would be a federal, and not (as here) a state, offense, it was similarly argued to this Court that the tax related to past transactions. Like the present petitioner, Lewis predicated this contention upon the regulation,[4] and urged an additional theory as well.[5] As this Court pointed out in ruling against Lewis (348 U. S. at 422), the Act, which was passed on October 20, 1951 (65 Stat. 529), and became effective on November 1, 1951, was adequate notice that if a person wished to engage in the business of taking wagers at any time after the latter date, he would not only have to pay the occupational tax but would also have to make certain disclosures in connection therewith. The fact that the regulations gave a period of grace for payment of the tax did not alter the nature of the statute as imposing a tax which was "wholly prospective" in that the special tax had to be paid before engaging in the business of wagering. *Lewis* v. *United States*, 348 U. S. 419, 422; see also *United States* v. *Kahriger*, 345 U. S. 22, 32–33. Therefore, the possibility that petitioner might have engaged in incriminating activities before attempting to register (which the court

[4] See Brief for Petitioner in No. 203, O. T. 1954, p. 15.

[5] Lewis also argued that there was no tax due on the wagers until one had been accepted, and therefore registration would relate to past transactions. (See *id.*, pp. 6–14.)

below did not find in the record) does not alter the incidence of the tax. No one compelled petitioner to accept wagers. When he did so after November 1, 1951, he acted with full knowledge that the Federal Government had imposed both a tax and registration requirements on this occupation. If he chose to take wagers, he had to incur the risk of the conditions imposed by the statute. As this Court said in *Lewis* (348 U. S. at 23), "* * * there is no constitutional right to gamble."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956